UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16,215.

LESLIE M. SIBERELL, on Behalf of Himself and His Co-defendants, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, and MABEL ROBSON,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

APPELLANTS' OPENING BRIEF.

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INDEX

Statement of Case 2

The Facts 2

Questions Presented and How Raised 4

Specification of Errors 4

Summary of Argument 4

Argument—

I. A Defendant May Be Relieved from a Default Judgment 5

II. An Adequate Showing for Relief Was Made under Rule 60, and It Was an Abuse of Discretion to Deny Relief 6

Conclusion 9

Table of Cases

Barber v. Turberville, D. C., 1954, 218 F. 2d 34 7

Perrin v. Aluminum Co., etc., 1952, 197 F. 2d 254 ..... 8, 9

Re Cremidas' Estate, D. C. Alaska 1953, 14 F.R.D. 15 6-7

Tozer v. Krause, etc., 189 F. 2d 242, 3 Cir., 1951 7

Statutes Cited

Rule 60 (b) (1) and (6) of the F.R.C.P. 5, 6

Title 28, U.S.C., Section 1291 1

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This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, denying the motion of defendants Siberell et al., to vacate a default judgment against them (R. 35-36).

This Court has jurisdiction of this appeal, under Title 28, U.S.C., Section 1291.

STATEMENT OF CASE.

Appellant Leslie M. Siberell filed a Motion to Vacate Judgment Against Certain Defendants Not Notified of Action (R. 24). By supporting affidavit he showed that neither he nor any of the moving parties interested in Parcel 481 had ever been served or notified of the condemnation action; that immediately upon learning of its pendency from an unrelated defendant (Ray L. Steven, see R. 27) he made persistent effort to learn if the property, of which he was an heir, had litigable value; that he employed mining geologists and an assayer and made two trips to said Parcel 481 (R. 28); even before he learned that its value was probably vastly in excess of the $100.00 awarded to the estate of the mother Minnie Siberell, he conferred with the United States Attorney in an effort to have the matter reopened (R. 27, par. 8). Failing in this, he promptly employed counsel and filed a Motion to Vacate on behalf of all the heirs (R. 27, par. 9). Said Motion was denied (R. 35).

THE FACTS.

The following abstract of the facts, unless otherwise designated, are all set forth in an affidavit of Leslie M. Siberell (R. 26-28).

Appellants are all the heirs of Minnie V. Siberell, who was deeded Parcel 481 (Birds Eye Porphyry mining claims).

A condemnation suit was commenced by Appellee involving 529,533 acres including said Parcel 481 (R. 3-).

Service by publication was made in a San Bernardino newspaper (R. 5-). Copy of Findings of Fact, Conclusions of Law and Judgment and Decree Fixing Compensation was mailed to Appellant on October 22, 1957 (R. 7-). Said Findings show that these appellants were not at the hearing on July 22 or 23, 1957 (R. 10).

Appellants, that is one of them, Leslie M. Siberell, learned of the proceedings involving property of their mother's estate by a telephone call from Raymond L. Steven to Leslie (R. 27). Said Steven subsequently, to show the facts and to aid the Siberells, disclaimed all interest in the property (R. 19).

Upon learning of the condemnation proceedings, appellant Leslie M. Siberell endeavored to view the property and have it appraised by his own appraiser, but encountered Navy obstinacy for several months: He asked the United States Attorney for the location of the parcel (R. 20), and asked for Navy permission to view it, but this was refused in September, 1957 (R. 20-21).

Finally, on October 24, 1957, the United States Attorney interceded on his behalf, and, again on December 12, 1957, wrote the Navy a peremptory letter (R. 22-23).

Thereafter, on February 1, 1958, he procured a Recreation Pass from the Navy and made two trips to Parcel 481 with mining geologists (R. 28).

His mining experts reported to him that the property was commercially valuable and estimated that the value of the ore, on location, was $100,000.00 (R. 31).

Thereupon, Appellant Siberell filed his Motion to Vacate, as aforesaid.

QUESTIONS PRESENTED AND HOW RAISED.

I.

The first question present is whether a defendant may be relieved from a default judgment. It was raised by the motion.

II.

The next question is whether the showing for relief was timely and sufficient. The motion also raised this issue.

SPECIFICATION OF ERRORS.

I.

The Court erred in denying appellants an order partially setting aside the judgment.

II.

The Court erred in refusing to permit appellants permission to answer and defend with respect to Parcel 481.

SUMMARY OF ARGUMENT.

Upon a proper showing, the rules permit relief to a defendant from a default judgment. After a showing like appellants' it is an abuse of discretion to deny relief.

A showing of excusable neglect, coupled with gross injustice if made within one year after entry of judgment, presents a showing requiring relief.

It is submitted that the following facts, presented by affidavit and the record, constituted such a showing:

1. These appellants were never personally notified of the proceedings. Service was made by publication, and in a paper in a county other than where they reside.

2. Upon learning of the proceedings from a friend, they acted promptly to ascertain the facts and the litigable value of their claim.

3. They then promptly asked the court for relief.

4. Finally, there is a gross and inequitable discrepancy between the $100.00 awarded by the court and the $100,000.00 valuation of appellants' experts, and justice requires that appellants have an opportunity to have the value of their inheritance determined.

ARGUMENT.

I.

A Defendant May Be Relieved from a Default Judgment.

It would seem that there should be no doubt on this proposition; that Rule 60 (b) (1) and (6) of the F.R.C.P. is controlling.

The rule, in part, reads:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judg-

ment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Since there probably will not be any disagreement on this point it will not be belabored.

The remaining question, then, involves whether appellants met this standard, and whether it was an abuse of discretion to deny relief.

II.

An Adequate Showing for Relief Was Made under Rule 60, and It Was an Abuse of Discretion to Deny Relief.

Rule 60 should be liberally construed, so that a motion presenting questions of substantial rights should be resolved in favor of setting aside a judgment, where parties have not been afforded opportunity to have their case decided on merits. This was the holding in *Re Cremidas' Es-*

tate, D. C. Alaska 1953, 14 F. R. D. 15. Also see *Barber* v. *Turberville,* D. C., 1954, 218 F. 2d 34.

The facts are not really in dispute. There was no personal service on appellants or their privies; the service by publication was in a newspaper different from the county of their residence; they acted promptly upon receiving knowledge of the action, and their motion for relief was well within the year mentioned in the rule.

They also acted diligently. They at once made every possible effort to determine if there was anything in the case to justify employing a lawyer. They proceeded against and overcame obstacles of military red tape. Upon finally receiving permission to inspect the property they employed experts and made two trips to the property. Upon learning that there probably was value in the property and vastly in excess of the nominal sum awarded, they promptly asked the court for relief.

It has been held by the Third Circuit that it was an abuse of discretion to refuse to vacate a default judgment, under the following circumstances: the allegations of appellant showed that he had never been properly served or notified in the action, and that he had a defense meriting consideration, and one that, if found true, required judgment in his favor. *Tozer* v. *Krause, etc.,* 189 F. 2d 242, 3 Cir., 1951. In its Tozer opinion, the court commented favorably on the Pennsylvania law that the general rule is that the rule on "the opening of default judgment is one of utmost liberality." (245). This is also the holding of *Barber* v. *Turberville, supra.*

There is not much authority to be found construing Rule 60. The standard for reversal, however, is clearly that appellant must show abuse of discretion on the part of the trial judge. The allegations in the Motion and supporting affidavits can be weighed differently, by different minds but appellants urge that the facts alleged definitely show an injustice would be worked by maintaining the $100.00 default award. Here, where the discrepancy between the $100.00 award and the probable value of the land is so great, the usual intendment in favor of the trial court's decision should be relaxed. It is submitted that it would work an obvious and harsh injustice to not relax the rule and to not give the appellants the opportunity of presenting their evidence.

Finally, in anticipation of appellee's argument, and to perhaps obviate the necessity of a closing brief, it is urged that appellants are not using Rule 60 as a substitute for the appellate procedure provided by law. Appellants had nothing to appeal from when they were served with a copy of the judgment in October, 1957. They had made no record of value in the proceedings, for they had had no opportunity to do so. They didn't even know if there was anything in the case worth fighting over. Thus, their situation is distinguishable from that in the nearest Ninth Circuit opinion our research has found, this court's decision in *Perrin* v. *Aluminum Co., etc.,* 1952, 197 F. 2d 254. In Perrin, the appellants had their appeal dismissed for want of jurisdiction and they tried to start over again in the trial court by a Motion to Vacate Judgment. This Court summed up their situation: "Having in consequence of their own

lack of diligence been turned away at the front door, they now seek entry at the rear." (255). That is not true here. Appellants had no substantial chance to present their evidence. That is all they ask.

CONCLUSION.

The case should be remanded with instructions to give appellants an opportunity to present their evidence on value.

Respectfully submitted,

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J. B. TIETZ,

Attorney for Appellants.